IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-5999

GRACE AZNAVORIAN, et al.,

Appellants,

vs.

JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare,

Appellee.

JURISDICTIONAL STATEMENT

INTRODUCTION

This appeal raises important questions concerning the right to relief available under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381 et seq., commonly known as the Supplemental Security Income Program (SSI). The district court certified a nationwide class of all individuals who were otherwise eligible for SSI when they received final decisions from the Secretary of Health, Education and Welfare denying or suspending[1/] their SSI solely pursuant to 42 U.S.C. §1382(f) and its implementing regulation between September 26, 1975 and August 23, 1977. After declaring Section 1382(f) and its regulation

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1/ For ease of reference, appellants hereafter use the term "denying" to account for all forms of loss of SSI pursuant to 42 U.S.C. §1382(f) and its regulation. See class definition infra at 5.

unconstitutional because they violated the Fifth Amendment, the court limited relief to those class members who were receiving SSI, or would have been receiving SSI but for the Secretary's denial under the invalidated provisions, on the date it entered its Order -- August 23, 1977. The court denied all relief to two subclasses: individuals eligible for SSI but not applying for it at the time of the court's Order, and those no longer eligible for it on that date. These class members[2/] appeal from that part of the court's Order and Judgment. This Court will reach the issues raised by this appeal if it affirms those parts of the district court's Order and Judgment from which the Secretary appeals. Califano v. Aznavorian, No. _____ (jurisdictional statement due January 10, 1978.)

OPINION BELOW

The district court's opinion, not yet officially reported, is attached hereto (Appendix "App." A, infra, 1a - 31a), along with the Order (App. B., infra, 32a - 36a) and Judgment (App. C, infra, 37a - 39a).

JURISDICTION

This civil action was brought as a class action under 42 U.S.C. §§405(g) and 1383(c)(3) to declare 42 U.S.C. §1382(f) and 20 C.F.R. §416.1327[3/] unconstitutional, reverse the Secretary's decisions suspending or denying SSI under those provisions, and recover such benefits. The district court's final Order and Judgment were entered on August 23, 1977 and September 6, 1977, respectively. (App. B at 32a; App. C at 39a.)

The Secretary filed his Notice of Appeal from the Order and Judgment to this Court on September 22, 1977, pursuant to 28 U.S.C. §1252. (App. D, infra, 40a.) Section 1252 provides for such direct appeal from a judgment of a federal court holding a federal statute unconstitutional in a civil action to which a federal officer is a party. Mathews v. Lucas, 427 U.S. 495, 503 (1976).

After receiving the Secretary's Notice of Appeal, appellants timely filed their Notice of Cross-Appeal from the same Judgment and Order to this Court on October 4, 1977, pursuant to 28 U.S.C. §§1252 and 2101(a)(b). (App. E, infra, 41a - 42a.) The second paragraph in 28 U.S.C. §1252 requires that parties who have "received notice of appeal under this section shall take any subsequent or cross-appeal to the Supreme Court." On November 25, 1977, Mr. Justice Rhenquist extended the time for docketing this appeal to, and including January 10, 1978. [4/]

QUESTIONS PRESENTED

1. Are SSI beneficiaries, properly proceeding as a certified class under 42 U.S.C. §§405(g) and 1383(c)(3), entitled to judicial relief and opportunity to recover uncon-

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2/ "Appellants," as used hereafter are these class members. While the Secretary has refused to state the exact number of such individuals (Defandant's Objections to Plaintiff's Interrogatories), his agents admitted during depositions conducted December 2, 1977 that appellants exceed 9,000 people (Depo. of Robert Marder.)

3/ All references to Code of Federal Regulations are to the revision dated April 1, 1977.

4/ Because Mr. Justice Rhenquist's Order used the term "appeal" and "appellants" rather than "cross-appeal" and "cross-appellants," his nomenclature is adopted here.

stitutionally denied benefits only if they have current SSI applications and are still eligible for benefits at the time a district court renders judgment?

2. If the district court had some discretion to weigh equities in granting relief to successful SSI class members properly before it, was that discretion abused in this case?

FEDERAL STATUTES INVOLVED

Appellants reproduce the full texts of 42 U.S.C. §§ 405(g), 1382(f), and 1383(b), (c) in Appendix F, infra 43a-44a.

STATEMENT OF THE CASE

Pursuant to 42 U.S.C. §1382(f) and 20 C.F.R. §416. 1327, the Secretary denies all SSI recipients the benefits to which they are otherwise entitled solely because they travel outside the United States for one calendar month, or thirty days. On November 25, 1975, a nationwide class of SSI recipients, who had been denied benefits pursuant to Section 1382(f) and the regulation, brought suit under 42 U.S.C. §§ 405(g) and 1382(c)(3) to declare the statute and regulation in violation of their rights to due process and equal protection guaranteed by the Fifth Amendment, reverse the Secretary's decisions denying their SSI, and recover those benefits.

In her Complaint, plaintiff made it clear that she was prosecuting this case on a class basis and seeking appropriate class relief. (Complaint ¶¶9-13; Prayer ¶6.) Her motion to certify the class under Federal Rule 23(b)(2) and 42 U.S.C. §§ 405(g) and 1383(c)(3) described how each member was a proper claimant under Section 405(g) and 1383(c)(3). The Secretary conceded that if the Social Security Act did not preclude class actions, the instant class was properly defined. (Defendant's Brief In Opposition To Plaintiff's Motion For Class Action Certification at 1.)

The district court found that the Social Security Act did not preclude class actions, that the proposed class satisfied the requirements of Federal Rule 23(a) and (b)(2) (App. A at 3a-8a), and certified the following class:

> All individuals otherwise eligible for Supplemental Security Income, who have had such SSI denied, suspended, terminated, or interrupted pursuant to an initial written determination, an administrative reconsideration, an administrative hearing, or an Appeals Council review, based solely on 42 U.S.C. §1382(f) and regulations promulgated thereunder, from September 26, 1975 until the entry of this Order [August 23, 1977]. (Appendix B at 33a.)5/

All class members met the Section 405(g) requirement that judicial review be sought within sixty days of the adverse action because this class suit was filed on November 25, 1976 -- sixty days after September 26, 1975.

The court then held Section 1382(f) and its regulation unconstitutional because they violated equal protection and due process guarantees in the Fifth Amendment. (App. A at 17a.) It reasoned that the challenged provisions penalized SSI recipients for exercising their "basic constitutional right" to travel outside the United States by denying SSI pursuant to a blanket durational-loss of United States residency test for any departure of one full calendar month, or thirty days, regardless of whether the recipients in fact remained United States residents. (Id. at 10a.) Finally, it noted that while limiting SSI to United States residents and preventing fraudulent receipt of benefits were legitimate governmental interests, Section 1382(f) did not bear a "fair and substantial relationship" to those interests and that "less drastic means" for achieving those purposes were available. (Id. at 13a-19a.)

5/ The district court clearly intended to include in the certified class all individuals who were otherwise eligible for SSI at the time they were denied benefits pursuant to Section 1382(f), not just those who were eligible on the Order date. If the court had intended the latter meaning, it would have been unnecessary for the court to explain why it denied relief to appellants (App. A at 25a) or limited its relief Order only to some members of the certified class. (App. B at 33a-34a.)

After orally ruling Section 1382(f) unconstitutional, the court then directed that a motion be filed to obtain class relief in the final judgment. (Memorandum In Support Of Plaintiffs' Motion For Order Granting Class Relief at 1.) Noting that all members were litigating timely claims under 42 U.S.C. §§ 405(g) and 1383(c)(3), plaintiff sought the same relief for the entire class: reversal of the SSI denials and an opportunity to recover the entitlements based on residency determinations meeting constitutional standards. She did not seek automatic payment of the benefits denied pursuant to the unconstitutional provisions.

The court granted the requested relief, but limited it to those class members who (a) "are receiving SSI benefits on" August 23, 1977, or (b) "would be receiving SSI benefits on" August 23, 1977 "but for current operation of Section 1382(f) and regulations promulgated thereunder." (App. B at 34a.) It refused all relief to appellants, although by the class definition they submitted timely claims for relief in the district court under 42 U.S.C. §§ 405(g) and 1383(c)(3).

THIS APPEAL PRESENTS SUBSTANTIAL QUESTIONS REQUIRING PLENARY REVIEW BY THIS COURT

A.

All SSI Beneficiaries, Properly Proceeding As A Certified Class Under 42 U.S.C. Sections 405 (g) And 1383(c)(3), Are Entitled To Judicial Relief And Opportunity To Recover Unconstitutionally Denied Benefits, Without Having Current SSI Applications Or Being Eligible For Continuing Benefits At the Time A District Court Renders Judgment.

The district court granted relief by providing some individual class members the opportunity to establish retention of their United States residences by proper constitutional

standards at new administrative proceedings. If successful, they were entitled to recover their denied benefits. However, the court refused all relief to two subclasses of the certified class: (1) individuals eligible for, but not having current applications for, SSI on the date of the court's Order and (2) individuals no longer eligible for SSI on that date. By denying relief to these people, the court effectively imposed on them additional requirements for securing judicial relief and recovery of underpayments pursuant to 42 U.S.C. §§ 405(g) and 1383(b), (c)(3), that are nowhere found in these sections and indeed conflict with them. This decision, unless reversed, will severely restrict judicial relief under the SSI Program.

Section 1383 sets out the conditions for an individual to obtain review of the Secretary's adverse decisions concerning his eligibility for SSI. First, subsection 1383(c)(1) requires the Secretary to provide a hearing to

> any individual who . . . claims to be . . . eligible [for SSI from the time of denial] and is in disagreement with any determination . . . with respect to eligibility . . . for benefits, . . .

Subsection 1383(c)(3) then provides that the Secretary's determination

> after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title . . .

Section 405(g) provides:

> Any individual after any final decision of the Secretary . . . may obtain a review of such decision by a civil action commenced within sixty days after . . . such decision.

This Court has held that the "final decision" requirement is satisfied if (1) the individual receives at least an initial denial of benefits from the Secretary, (2) he challenges that denial solely on constitutional grounds, and (3) the Secretary waives any further administrative proceedings. Mathews v. Diaz, 426 U.S. 67, 73, 75-77 (1976); Mathews v. Eldridge, 424 U.S. 319, 328-332 (1976); Weinberger v. Salfi, 422 U.S. 749, 766 (1975).

Appellants met these requirements. (See, supra, at 4-5.)

Once an individual's claim is properly before the reviewing court, Section 405(g) spells out the relief which must be afforded:

> The Court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing.

Upon reversal and remand, the Secretary must redetermine the individual's eligibility. If he was eligible for the payments initially denied, the Secretary must pay him those benefits regardless of the reason for denial. 42 U.S.C. §1383(b). The Secretary concedes that recovery is permitted upon invalidation of an unconstitutional statute or regulation:

> Under such [statutes], every claimant properly before the court who establishes a meritorious claim may obtain fully adequate relief. If the claimant's contentions, constitutional or otherwise, are sustained, a judgment by the district court may reverse the decision of the Secretary and order the payment of benefits (or reconsideration of the claim under the proper standards). (Defendant's Supplemental Brief In Opposition To Convening Three-Judge Court at 5.) (Emphasis added). 6/

As the district court recognized, Section 1383(b) implements Congressional intent that SSI beneficiaries "receive the full and correct amount of their entitlement, even if this requires payments to be made long after the period of entitle-

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6/ Indeed, if the Secretary precluded such benefits after claimants proved their denials improper, this would raise substantial due process problems, as recognized by a line of cases invalidating an Agriculture Department practice of denying all recovery of food stamp assistance in such situations. These cases reason that the due process right to an administrative hearing before final federal deprivation of a statutory entitlement carries with it the right to some relief for incorrect deprivation. E.g., Stewart v. Butz, 356 F.Supp. 1345, 1349 (W.D. Ky. 1973) aff'd 491 F.2d 165 (6th Cir. 1974); see also, Bermudez v. United States Department of Agriculture, 490 F.2d 718 (D.C. Cir.), cert. denied 414 U.S. 1104 (1973). This reasoning applies here, since SSI recipients have pretermination hearing rights as a matter of statute (42 U.S.C. §1383(c)), regulation (20 C.F.R. §1336(c)), and due process (Tatum v. Mathews, 541 F.2d 161, 165 (6th Cir. 1976); Johnson v. Mathews, 539 F.2d 1111, 1117-1122 (8th Cir. 1976)).

ment." (App. A at 22a, quoting Jimenez v. Weinberger, 523 F.2d 689, 704 (7th Cir. 1975), cert. denied 427 U.S. 912 (1976), construing parallel language in 42 U.S.C. §404.) Appellate decisions uniformly hold that Section 1383(b) grants SSI beneficiaries an opportunity to recover benefits illegally denied. E.g., Tatum v. Mathews, 541 F.2d 161, 166 n.5 (6th Cir. 1976); Johnson v. Mathews, 539 F.2d 1111, 1125 (8th Cir. 1976).

Nothing in the Act or the Secretary's regulations permits a court to refuse relief to an individual SSI claimant after concluding the Secretary denied him benefits pursuant to an unconstitutional statute. The Secretary's regulation states that:

> A person's right to supplemental security income payments --how much he gets and under what conditions--are clearly defined in the law. 20 C.F.R. §416.110(b).

Specifically, nothing in the Act or regulations permits a court to deny relief to a claimant properly proceeding under Sections 405(g) and 1383(c)(3) because he does not have a current application for benefits (appellant subclass 1) or because he is no longer eligible for SSI (appellant subclass 2) when the court renders its decision. Pursuant to 20 C.F.R. §416.536, underpayments occur only during periods for which a claimant "filed application" and "met" SSI eligibility conditions. There is no requirement that he be filing an SSI application or be eligible therefor when a reviewing court renders its decision. Moreover, the underpayment period runs, and the "fact of underpayment" becomes established, during all months "for which there is a difference between the amount paid and the amount due". 20 C.F.R. §416.538. There is no requirement that any SSI be due to the claimant for the month when the court renders its decision. Indeed, 20 C.F.R. §416.542(a) provides for disbursing underpayments in a "separate payment" in such situations.

Together, 42 U.S.C. §§ 405(g), 1383(b)(c), and 20 C.F.R. §§ 416.536, 416.538 impose obligations (1) on the district court, at least to grant a remand for an administrative

rehearing to an individual otherwise eligible for SSI when benefits were illegally denied, and (2) on the Secretary to pay those wrongfully denied benefits to such an individual. The district court could not condition such obligations on an individual's eligibility for SSI or pending SSI application on the date of judicial decision, since to do so would create an additional eligibility requirement unauthorized by the Act. 7/

Individual claimants who happen to be class members satisfying all requirements of Sections 405(g) and 1383(c)(3) have the same rights to judicial review and recovery of underpayments as all other individuals. The district court ruled that class actions are permitted under Sections 405(g) and 1383(c)(3). See, e.g., Liberty Alliance v. Califano, Nos. 77-1010/11 (3rd Cir. December 6, 1977); Wilson v. Edelman, 542 F.2d 1260, 1275 (7th Cir. 1976); Tatum v. Mathews, supra, 541 F.2d at 163-164; Johnson v. Mathews, supra, 539 F.2d at 1125-1126; Jimenez v. Weinberger, supra, 523 F.2d at 694-696; Cardinale v. Mathews, 399 F.Supp. 1163, 1169 (D. D.C. 1975); Oliver v. Califano, CCH Unemployment Ins. Rep. ¶15,244 (C.D. Cal. 1977); see also, Norton v. Mathews, 427 U.S. 524, 533-538 (1976) (Stevens, Brennan, Marshall, J.J. dissenting) (Court did not reach the class certification issue, but dissent noted class actions proper); DeLao v. Califano, 560 F.2d 1384, 1387 (9th Cir. 1977). Consistent with those decisions and this Court's opinions in Mathews v. Eldridge, supra, 424 U.S. at 328-333, and Mathews v. Diaz, supra, 426 U.S. at 73, 75-77, the court defined the class so that every member individually satisfied the judicial review requirements of Section 405(g) and

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7/ Cf. Carleson v. Remillard, 406 U.S. 598, 600 (1972); Townsend v. Swank, 404 U.S. 282, 286 (1971); King v. Smith, 392 U.S. 309, 333 (1968). These cases rely on Congressional legislative history in holding that states cannot enact additional eligibility requirements unauthorized by federal statute.

1383(c)(3). Each member received a "final decision" from the Secretary by a denial of benefits solely pursuant to an allegedly unconstitutional statute, and by his concession that no further administrative remedies need be pursued. (See, supra, at 4-5.) Each had filed suit within sixty days after the denial of benefits. (See, supra, at 5.) Finally, the Secretary conceded that the court's class definition was proper under Sections 405(g) and 1383(c)(3). (See, supra, at 4.) Indeed, the class certified here is identical in all material respects to those in Jimenez v. Weinberger, supra, 523 F.2d at 695-696, and Oliver v. Califano, supra, CCH Unemployment Ins. Rep. ¶15,244 at 2499-120.

The proper certification of a class action under Sections 405(g) and 1383(c)(3) "conferred jurisdiction on the District Court to hear [the timely claims] by each individual member of the class." Johnson v. Mathews, supra, 539 F.2d at 1126; Jimenez v. Weinberger, supra, 523 F.2d at 694, 695-696. Given such jurisdiction for judicial review in Social Security class actions, courts uniformly grant back payment relief to all class members denied benefits solely by virtue of unconstitutional statutes (Jimenez v. Weinberger, supra, 523 F.2d at 704; Griffin v. Richardson, 346 F.Supp. 1226, 1237 (D. Md.) (three-judge court), aff'd 409 U.S. 1069 (1972); Morris v. Richardson, 346 F.Supp. 494, 500 (N.D. Ga. 1972) (three judge court), vac. and remanded on other grnds. 409 U.S. 464 (1973); Oliver v. Califano, supra), or the opportunity to obtain such relief at an administrative hearing. Tatum v. Mathews,

supra, 541 F.2d at 166 n.5; Johnson v. Mathews, supra, 539 F.2d at 1125.

The foregoing statutes, regulations and cases establish appellants' entitlement to relief under the Social Security Act, as a matter of right. The district court cited no Social Security statute, regulation or case to support its denial of relief. It relied solely on Rothstein v. Wyman, 467 F.2d 226, 235 (2nd Cir.), cert. denied 411 U.S. 921 (1972), which held that under the Aid To Families With Dependent Children program, 42 U.S.C. §§ 601 et seq., a court is not required to order a state to make retroactive payments to c'ass members illegally denied AFDC benefits. But the AFDC statutory scheme is so fundamentally different from the SSI Program that Rothstein is simply inapplicable in resolving the class relief question here. First, no statute required states to restore AFDC payments wrongfully denied. See Jimenez v. Weinberger, supra, 523 F.2d at 704 n.33. In contrast, Section 1383(b) and implementing regulations require such payments to SSI beneficiaries. Second, Congress did not specifically authorize suits in federal court to review illegal AFDC denials; the claim to recover the payments in Rothstein was based upon the court's pendent jurisdiction. Under the SSI Program, Congress specifically authorized suits in federal court to review SSI denials, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3). Third, because Congress has placed a sixty-day limitation period on seeking judicial review in SSI cases (§§ 405(g) and 1383(c)(3)), there is neither need nor room for district courts to guess, as in Rothstein, whether recovery of underpayments "would appear" to be "compensatory rather than remedial." (App. A at 25a.) Given these basic distinctions between the two statutory schemes, the district court had no discretion to consider any so-called equitable factors in determining whether to grant appellants the relief requested.

B.

Even If The District Court Had Some Discretion To Weigh Equities In Granting Relief To Successful Class Members Properly Before It, That Discretion Was Abused In this Case.

Assuming, arguendo, that the district court had some discretion to weigh equities in determining whether to grant appellants relief, refusing all relief was an abuse of discretion.

(1) Subclass eligible for SSI on the order date but not applying for it at that time. The district court recognized the possibility that "these persons are indeed needy." (App. A at 26a.) Thus, granting relief to this subclass would serve the court's articulated purpose of the SSI Program: "to help those who are currently needy." (App. A at 25a.) In fact, denying relief to this group penalized them twice: first for exercising their right to travel and denying benefits, and second for attempting to survive without governmental assistance despite their age, disability, or blindness.[8/] One can only speculate why these appellants did not reapply for SSI, but as this Court noted in Goldberg v. Kelly, 397 U.S. 254, 264 (1970),

> ...[Public assistance] provides the means to obtain essential food, clothing, housing, and medical care...[T]ermination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy. (Emphasis added or in original and footnote omitted.)

8/ This Court has noted that public assistance "is given to persons on the very margin of subsistence. . . " Mathews v. Eldridge, supra, 424 U.S. at 340.

Despite these factors, the court denied relief to this subclass, asserting:

> It would impose a completely unrealistic and undue burden on the defendant to expect him to determine who these persons might be. (App. A at 26a.)

This reasoning is factually incorrect. Despite the Secretary's hedging since the inception of this litigation (see, supra at 2, n.1), his agents admitted in a recent deposition that they can identify all persons who were unconstitutionally denied benefits pursuant to 42 U.S.C. §1382(f). They made no distinction between identifying this subclass and all other class members. Indeed, they could make no such distinction, since the computer code, identifying recipients denied SSI pursuant to the unconstitutional statute, lumps all such people into one category. (Deposition of Robert Marder, December 2, 1977.)

The district court's reasoning also conflicts with other parts of its decision. It rejected the Secretary's "administrative burden" argument for avoiding back payments to other class members, because (a) he conceded that the requested class relief would not require reducing the scope of SSI beneficiaries; (b) his administrative burden argument is only a factually unsupported "assertion," and (c) administrative costs alone are insufficient cause for denying unconstitutionally suspended public entitlements. (App. A at 22a-23a.) See Jimenez v. Weinberger, supra, 523 F.2d at 704. These reasons apply equally to this subclass of admittedly poor persons eligible for SSI.

(2) Subclass no longer eligible for SSI on the Order date. The district court denied relief to this subclass because:

> [R]etroactive payments should go to only those who were unconstitutionally denied benefits in the past, but who are still currently needy, and thus still eligible for SSI benefits. If a person is not presently needy, then there would be no purpose served by granting him retroactive benefits. In such a situation it would appear that the payments would 'become compensatory rather than remedial' (quoting Rothstein v. Wyman, supra). (App. A at 25a.) (Emphasis in original.)

This reasoning, like that applied to the first subclass, conflicts with the court's earlier recognition that the Secretary's unconstitutional denials

> necessarily required the plaintiff class members to consume other assets in order to attempt to maintain their standard of living, while at the same time exercis[ing] their right to travel. (App. at 21a-22a.)

Thus, granting the opportunity to other class members to recover unconstitutionally denied SSI served the purpose of compensating them for their injuries. See, Jimenez v. Weinberger, supra, 523 F.2d at 703; Goldberg v. Kelly, supra, 397 U.S. at 264. Merely because the members of this subclass would not qualify for SSI on August 23, 1977 does not negate their earlier economic injury shared with all other class members. Granting them similar relief will likewise compensate them. Just because these appellants have by one means or another managed to ward off starvation pending receipt of the SSI to which they were previously entitled provides no reason for refusing relief. "To hold otherwise would provide a money saving device for governments at the expense of those of our citizenry least able to bear [that] burden." Board of Social Welfare v. County of Los Angeles, 27 Cal.2d 81, 86, 162 P.2d 630 (1945) (interpreting state public assistance statute as creating a debt owed to eligible recipients). See also, Tripp v. Swoap, 17 Cal.3d 671, 682-683, 552 P.2d 749 (1976).

Nor can the district court simplistically rely on Rothstein v. Wyman, supra, to determine that granting relief to this subclass would be "compensatory rather than remedial." As noted at page 12, supra, district courts have no room in SSI litigation, as they did in AFDC cases, to guess when recovery of underpayments "would appear" to be compensatory: Sections 405 (g) and 1383(c)(3) provide a bright-line period for SSI claimants to seek such recovery through judicial review. All members of this subclass met this period by class definition. (App. B at 33a.)

For these reasons, the district court abused any discretion it might have had to determine the availability of relief to appellants.

CONCLUSION

Appellants respectfully request that this Court note probable jurisdiction and grant plenary consideration to this appeal.

DATED: January 6, 1978

Respectfully submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GRACE AZNAVORIAN, et al., Plaintiffs, v. JOSEPH A. CALIFANO, JR., etc., Defendant.	Civil No. 75-1103-GT

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §1252, from the order of the District Court entered in this action on August 23, 1977, and from the judgment of the District Court entered on September 6, 1977.

DATED: September 22, 1977.

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DMW/jj

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GRACE AZNAVORIAN, et al.,

Plaintiffs,

vs.

JOSEPH A. CALIFANO, JR., etc.,

Defendant.

CIVIL ACTION NO. 75-1103-GT

NOTICE OF CROSS-APPEAL

Notice is hereby given that plaintiff, GRACE AZNAVORIAN, on behalf of her class members denied relief by the District Court judgment (and order incorporated herein) entered September 6, 1977, hereby cross-appeals to the Supreme Court of the United States from such judgment and order. This cross-appeal is taken to the Supreme Court, since plaintiffs have received notice

of defendant's appeal in this matter to said Court pursuant to 28 U.S.C. §1252. This cross-appeal is authorized by the second paragraph in 28 U.S.C. §1252 and by 28 U.S.C. §2101.

Respectfully submitted:

DATED: October 7, 1977

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Attorneys for Plaintiffs

APPENDIX F

42 U.S.C. §405(g) provides:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office."

42 U.S.C. §1383(b) and (c) provide:

"(b) Whenever the Secretary finds that more or less than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in future

payments to such individual or by recovery from or payment to such individual or his eligible spouse (or by recovery from the estate of either). The Secretary shall make such provision as he finds appropriate in the case of payment of more than the correct amount of benefits with respect to an individual with a view to avoiding penalizing such individual or his eligible spouse who was without fault in connection with the overpayment, if adjustment or recovery on account of such overpayment in such case would defeat the purposes of this subchapter, or be against equity or good conscience, or (because of the small amount involved) impede efficient or effective administration of this subchapter.

"(c) (1) The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disagreement within thirty days after notice of such determination is received.

(2) Determination on the basis of such hearing, except to the extent that the matter in disagreement involves the existence of a disability (within the meaning of section 1382c(a)(3) of this title), shall be made within ninety days after the individual requests the hearing as provided in paragraph (1).

(3) The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title; except that the determination of the Secretary after such hearing as to any fact shall be final and conclusive and not subject to review by any court.

42 U.S.C. §1382(f) provides:

Notwithstanding any other provision of this subchapter, no individual shall be considered an eligible individual for purposes of this subchapter for any month during all of which such individual is outside the United States (and no person shall be considered the eligible spouse of an individual for purposes of this subchapter with respect to any month during all of which such person is outside the United States). For purposes of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days.

No. 77-5999

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

GRACE AZNAVORIAN, ET AL., APPELLANTS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

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Pursuant to Rule 16 of this Court, appellee moves to affirm the portion of the district court's judgment challenged on this cross-appeal.

The background of this case, in which the district court invalidated Section 1611(f) of the Social Security Act, 42 U.S.C. (Supp. V) 1382(f), is set forth at length in the jurisdictional statement filed in connection with the Secretary's appeal (No. 77-991) of the district court's decision. We have argued that the district court was wrong on the merits, and that it erred in ordering retroactive class relief. On this cross-appeal appellants contend that the district court too narrowly defined the class of persons to whom relief was due. This Court need not reach that issue unless it rejects all of our contentions in No. 77-991.

Appellants assert (J.S. 9-10) that the district court erred in failing to order relief for the entire certified class. 1/ Instead, the district court, using equitable discretion, ruled that only those class members who were then receiving Supplemental Security Income (SSI) benefits, or who would have been receiving such benefits in the absence of the allegedly unconstitutional statutory provision, were entitled to receive SSI benefits denied pursuant to the invalidated "30-day rule" of Section 1611(f) (J.S. App. 25a-26a). The district court reasoned that "retroactive benefits should go to only those who were unconstitutionally denied benefits in the past, but who are still currently needy, and thus still eligible for SSI benefits. If a person is not presently needy, then there would be no purpose served by granting him retroactive benefits. In such a situation it would appear that the payments would 'become compensatory rather than remedial'" (J.S. App. 25a).

The Secretary's view is that retroactive and class relief is unavailable in actions challenging the constitutionality of Social Security Act provisions. If, however, the district court could appropriately award retroactive class relief in this case, it certainly did not abuse its equitable discretion in granting such relief only to those who are "currently needy."

1/ The certified class was defined as (J.S. App. 33a):

> All individuals otherwise eligible for Supplemental Security Income, who have had such SSI denied, suspended, terminated, or interrupted pursuant to an initial written determination, an administrative reconsideration, an administrative hearing, or an appeals Council review, based solely on 42 U.S.C. §1382(f) and regulations promulgated thereunder, from September 26, 1975 until the entry of this Order.

Appellants maintain (J. S. 12) that the district court had no discretion to deny retroactive benefits to certain class members, because Section 1631(b) of the Act, 42 U.S.C. (Supp. V) 1383(b), requires the payment of all wrongfully withheld SSI benefits. 2/ But Section 1631(b) merely directs the Secretary to make retroactive payments to persons who were wrongfully denied benefits to which they were statutorily entitled. Neither Section 1631(b) nor any other provision requires the Secretary to pay retroactive SSI benefits to persons specifically excluded from such benefits under a statutory provision subsequently held unconstitutional. See DeLao v. Califano, 560 F. 2d 1384 (C.A. 9); Tatum v. Mathews, 541 F. 2d 161 (C.A. 6); and Johnson v. Mathews, 539 F. 2d 1111 (C.A. 8), which hold that claimants had been denied procedural due process in connection with the termination of their SSI benefits, but that retroactive relief under Section 1631(b) was appropriate only for those claimants found to be statutorily eligible for benefits. Congress simply has not provided for the payment of retroactive benefits in circumstances like those presented here, where the claimants have not, and cannot, demonstrate their statutory eligibility for such payments. Indeed, that is why the Secretary has argued that retroactive relief not only is not required but also is absolutely barred by sovereign immunity (see J.S. No. 77-991, pp. 13-14).

2/ Section 1631(b) provides in relevant part:

> Whenever the Secretary finds that more or less than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in future payments to such individual or by recovery from or payment to such individual or his eligible spouse (or by recovery from the estate of either).

Because no statute requires the payment of retroactive benefits, the district court could properly exercise the broad discretion that normally governs the award of equitable remedies. See, e.g., Hecht Co. v. Bowles, 321 U.S. 321, 329-331. The district court did not abuse its discretion in limiting its remedy to those who are currently needy, and in refusing to burden the Social Security Administration and the taxpayers with the expense of paying retroactive SSI benefits to persons who no longer need them and who are not entitled to them under the statute. Cf. Rothstein v. Wyman, 467 F. 2d 226, 235 (C.A. 2), certiorari denied, 411 U.S. 921 (retroactive payments not required to class members improperly denied benefits under the Aid to Families with Dependent Children Program).

CONCLUSION

This cross-appeal should be held in abeyance pending final disposition of the Secretary's appeal in No. 77-991. If the Court rules in favor of the Secretary in No. 77-991, this cross-appeal should be dismissed. If the Court rules against the Secretary on all issues in No. 77-991, the portion of the judgment challenged in the cross-appeal should be affirmed.

Respectfully submitted.

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MARCH 1978.